

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

United States of America,

Plaintiff,

vs.

Osmin Antonio Alas,

Defendant.

CR 08-874-TUC-CKJ (JCG)

**REPORT &
RECOMMENDATION**

Pending before the Court is a Motion to Suppress Statement filed by Defendant Osmin Antonio Alas on September 25, 2008. (Doc. No. 14.) The United States filed a response to the Motion and Defendant replied. (Doc. Nos. 16 & 17.)

This matter came before the Court for a report and recommendation as a result of a referral made on June 12, 2008, pursuant to LRCrim 5.1. (Doc. No. 4.) This matter was set for evidentiary hearing and evidence was heard on October 3, 2008. Defendant, who is not in custody, was present and represented by counsel. This matter was submitted following oral argument at the conclusion of the hearing and taken under advisement.

Having now considered the matter, the Magistrate Judge recommends that the District Court, after its independent review, DENY Defendant's Motion to Suppress Statement as to Defendant's pre-*Miranda* statements and DENY AS MOOT Defendant's Motion to Suppress Statement as to Defendant's post-*Miranda* statements.

FACTUAL FINDINGS

Defendant is a truck driver. On June 10, 2008, at approximately 12:30 a.m., Defendant was driving a tractor/trailer on State Route 82 near Sonoita, Arizona when he was

1 stopped at the primary inspection area of a temporary Border Patrol checkpoint. United
2 States Border Patrol Agent Brek Haymore testified that the primary inspection area of the
3 temporary checkpoint is marked by stop signs set out in the road near a Border Patrol Station.
4 The checkpoint is lit by portable artificial lighting. The checkpoint also includes a secondary
5 inspection area, defined by cones set up on a paved area just off the highway. Three agents
6 work the checkpoint: one at pre-primary inspection (the area where cars idle while waiting
7 to approach primary inspection), one at primary inspection, and one providing back-up
8 support near primary inspection. Additional agents working inside the nearby Border Patrol
9 Station are available to assist as needed. Signs posted along the road before the checkpoint
10 advise that all vehicles must stop. Agent Haymore testified that if a vehicle attempts to drive
11 through the checkpoint without stopping, it will be pursued by Border Patrol agents.

12 Agent Haymore testified that when Defendant's tractor/trailer stopped at the
13 checkpoint, he approached the cab and asked Defendant to state his citizenship. Defendant
14 replied in English that he was a naturalized United States citizen. Agent Haymore then asked
15 to see Defendant's bill of lading, a receipt which describes the trailer's load. The bill of
16 lading stated that Defendant was hauling cardboard from Nogales, Arizona to a recycling
17 plant in New Mexico. Agent Haymore then asked Defendant what he was hauling.
18 Defendant stated that he did not know. Defendant appeared nervous. Agent Haymore
19 testified that his questioning of Defendant lasted less than five minutes.

20 Agent Haymore testified that during the six months this temporary checkpoint was set
21 up, he routinely inspected tractor/trailers, routinely asked to see bills of lading and routinely
22 questioned the truck drivers about their haul. Agent Haymore stated that when inspecting
23 tractor/trailers, he asks about their loads because there is a risk that the trailer is being used
24 to smuggle narcotics or aliens into the country.

25 Agent Eduardo Gonzalez testified that he was working at the temporary checkpoint
26 in Sonoita with his service canine on a two-week assignment away from his usual Border
27 Patrol station. June 10, 2008 was Agent Gonzalez' third day working the checkpoint. He
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1 testified that his service canine, Kitty A, is trained to detect narcotics and concealed humans
2 hidden in vehicles. Kitty A is trained to sit to indicate that she has alerted to a scent in the
3 vehicle. Agent Gonzalez testified that according to his experience, Kitty A's alerts are
4 reliable. Agent Gonzalez further testified that his typical routine while working with Kitty
5 A is to run her along every vehicle. The only time vehicles are not inspected by Agent
6 Gonzalez and Kitty A is when Kitty A is on a required break. On the night of June 10, 2008,
7 Agent Gonzalez and Kitty A had inspected two vehicles before Defendant's vehicle arrived
8 at the checkpoint. One of those vehicles was a tractor/trailer. Kitty A did not alert to either
9 vehicle.

10 Agent Gonzalez testified that while Agent Haymore was questioning Defendant,
11 Agent Gonzalez approached the front left side of the trailer with Kitty A. Kitty A began to
12 act agitated and excited and her breathing increased in sound and intensity – all signals which
13 Agent Gonzalez recognized as a possible alert on the vehicle. Agent Gonzalez signaled to
14 Agent Haymore to send the tractor/trailer through secondary inspection; Agent Haymore
15 directed the Defendant to proceed to secondary.

16 Defendant pulled his tractor/trailer off the road into the secondary inspection area.
17 Agent Haymore followed Defendant's truck into the secondary inspection area but did not
18 speak to Defendant. Defendant remained in the cab of the truck while Agent Gonzalez ran
19 Kitty A around the left side of the trailer. In less than one minute, Kitty A alerted to the left
20 side of the trailer and sat at the back doors of the trailer. Agent Gonzalez was unable to run
21 Kitty A around the entire vehicle because Kitty A sat to signal her alert. Agent Gonzalez
22 testified that once Kitty A had alerted to the vehicle, he believed he had probable cause to
23 suspect that the trailer contained either narcotics or concealed humans. Agent Gonzalez
24 returned Kitty A to her kennel in his service vehicle.

25 Agent Gonzalez approached the cab of truck and spoke to Defendant in English. He
26 asked Defendant what he was hauling; Defendant replied in English that he did not know.
27 Agent Gonzalez asked to see Defendant's driver's log. The log showed that Defendant had
28 not made any runs for eleven days. Agent Gonzalez asked Defendant how he could make

1 a living if he had not worked in eleven days. Defendant appeared nervous and made
2 statements to Agent Gonzalez which suggested that he was having some personal problems.
3 Defendant then told Agent Gonzalez that someone had told him the trailer contained
4 cardboard. According to Agent Gonzalez, he spoke to Defendant for less than five minutes.

5 While Agent Gonzalez was talking to Defendant, other agents came out of the Border
6 Patrol station and approached the back of the trailer. They told Agent Gonzalez that the
7 trailer was locked. Agent Gonzalez asked Defendant if he had a key to the trailer and
8 Defendant said no. The agents used a bolt cutter to open the trailer and subsequently found
9 808 kilograms of marijuana in the trailer.

10 Agent Haymore testified that once the marijuana was discovered, he asked Defendant
11 to step out of the truck. He handcuffed Defendant and placed him under arrest. Agents
12 Haymore and Gonzalez testified that Defendant was parked in the secondary inspection area
13 for approximately 10-15 minutes from the time he pulled into the secondary inspection area
14 to the time he was arrested. After placing Defendant under arrest, Agent Haymore asked
15 Defendant if he wanted his *Miranda* rights read to him in English or Spanish; Defendant
16 stated that English was fine. Agent Haymore read Defendant his *Miranda* rights in English
17 and Defendant stated that he wished to remain silent. Agent Haymore placed Defendant in
18 a squad car and drove him approximately 40 yards to the Border Patrol Station. He then read
19 him his *Miranda* rights again, this time from a DEA form. Defendant again stated that he
20 wished to remain silent.

21 PROCEDURAL MATTERS

22 On August 25, 2008, the government noticed its intent to introduce into evidence
23 all statements made by the Defendant. In the Motion to Suppress filed on September 25,
24 2008, the Defendant argued for suppression of statements he made after being given his
25 *Miranda* warnings. In its Response, the government noted that the Defendant was not
26 challenging the admissibility of statements he made to Border Patrol Agents during
27 inspection at the checkpoint and therefore addressed only the issue of suppression of
28 Defendant's post-arrest statements. In his Reply, Defendant then argued for the first time

1 that his pre-arrest statements, made before Defendant was *Mirandized*, should also be
2 suppressed. Subsequently, the government noticed its intent to introduce only
3 Defendant's pre-*Miranda* statements and the government withdrew its notice of intent to
4 introduce post-*Miranda* statements. (Doc. No. 20.)

5 At the Court's request, the parties filed supplemental briefs regarding the
6 admissibility of Defendants' pre-*Miranda* statements. (Doc. Nos. 18, 20 & 22.) Based
7 on the government's withdrawal of its notice to introduce post-*Miranda* statements, the
8 only issue presented and considered at the hearing on October 3, 2008, was whether the
9 Defendant's pre-*Miranda* statements should be suppressed.

11 ANALYSIS

12 Defendant seeks to exclude admission of the statements he made to Agents Haymore
13 and Gonzalez while stopped at the checkpoint. Defendant contends that the agents
14 improperly questioned him without first giving him *Miranda* warnings.

15 *Miranda v. Arizona*, 384 U.S. 436 (1966), and its progeny govern the admissibility
16 of statements made during custodial interrogation in both state and federal proceedings.
17 Statements made while a defendant is in "custody or otherwise deprived of [his] freedom of
18 action in any significant way" which are not preceded by *Miranda* warnings are inadmissible
19 in evidence. *Id.* at 444. A defendant is considered to be "in custody" for purposes of
20 *Miranda* if a reasonable person would believe that he or she was not free to leave. *See*
21 *United States v. Kim*, 292 F.3d 969, 973-74 (9th Cir. 2002) (citing *United States v.*
22 *Beraun-Panez*, 812 F.2d 578, 580 (9th Cir. 1987)). The following factors are among those
23 likely to be relevant to deciding that question: "(1) the language used to summon the
24 individual; (2) the extent to which the defendant is confronted with evidence of guilt; (3) the
25 physical surroundings of the interrogation; (4) the duration of the detention; and (5) the
26 degree of pressure applied to detain the individual." *Id.* at 974 (citations omitted).

27 Generally, a brief detention at the border by immigration and customs officials of
28 persons presenting themselves for admission to the United States is not custody, even though

1 such persons are not free to leave or to refuse to be searched. *United States v. Butler*, 249
2 F.3d 1094 (9th Cir. 2001). In determining whether detention at a border patrol checkpoint
3 rises to the level of “custody” within the meaning of *Miranda*, courts must examine the
4 “objective circumstances of the interrogation.” *Id.* (citing *Stansbury v. California*, 511 U.S.
5 318, 323 (1994)). Those circumstances include the language used by the officers, the
6 physical characteristics of the place where the question occurs, the degree of pressure applied
7 to detain the individual, the duration of the detention, and the extent to which the person was
8 confronted with evidence of guilt. *Id.* (citing *United States v. Hudgens*, 798 F.2d 1234, 1236
9 (9th Cir.1986)). “Although the existence or non-existence of probable cause might be one
10 factor to consider in determining someone's custodial status in the twilight zone between
11 detention and custody, what ultimately matters to the determination of whether *Miranda* is
12 triggered is custody.” *Id.*

13 In the present case, Defendant was questioned for less than five minutes by Agent
14 Haymore. Agent Haymore testified that the questions he asked Defendant are questions
15 which he routinely asks truck drivers. Defendant was then questioned by Agent Gonzalez
16 at the secondary checkpoint, again for only a few minutes. Agent Gonzalez asked Defendant
17 routine questions about the type of load he was carrying and the information in his driver's
18 log book; Defendant was not “confronted with evidence of guilt.” Defendant was not
19 confined, handcuffed or under arrest at the time of questioning. He remained seated in the
20 cab of his truck during all questioning. There is no evidence to suggest that Defendant was
21 unduly pressured by the agents.

22 Defendant argues that Agent Gonzalez had probable cause to arrest him as soon as
23 Kitty A became agitated while walking alongside his vehicle at primary inspection, and
24 therefore Agent Gonzalez should have read Defendant his *Miranda* rights prior to
25 questioning him at secondary inspection. This argument fails for two reasons. First, as
26 previously stated, the existence of probable cause is only one factor in determining whether
27 an agent is required to *Mirandize* a suspect at a border checkpoint. Even if probable cause
28 existed at the time of questioning, Defendant was not “in custody” when he was questioned.

1 Second, although Kitty A's agitation, and later her alert, may have provided Agent Gonzalez
2 with probable cause to search the trailer, it did not give Agent Gonzalez probable cause to
3 arrest Defendant. The agents did not have probable cause to arrest Defendant until they
4 searched the vehicle and discovered marijuana inside. By then, all questioning of Defendant
5 had ceased. As soon as the marijuana was discovered, Defendant was arrested and read his
6 rights.

7 Finally, the facts of this case are nearly identical to the facts in *United States v.*
8 *Leasure*, 122 F.3d 837 (9th Cir. 1997), in which border patrol agents questioned a defendant
9 at a border patrol checkpoint after suspecting that the defendant's vehicle had been altered
10 to carry hidden narcotics and after a service canine alerted on the vehicle. The Court in
11 *Leasure* found no *Miranda* violation.

12 Accordingly, because Defendant was not in custody at the time Agents Haymore and
13 Gonzalez questioned him, the Defendant was not entitled to *Miranda* warnings at the
14 checkpoint and Defendant's rights were not violated by the questioning.

15 RECOMMENDATION

16 In view of the foregoing, it is recommended that, after its independent review of the
17 record, the District Court

- 18 1. DENY Defendant's Motion to Suppress Statement to the extent Defendant
19 seeks suppression of the statements that he made at the checkpoint prior to
20 being read his *Miranda* rights;
- 21 2. DENY AS MOOT Defendant's Motion to Suppress Statement to the extent
22 Defendant seeks suppression of his post-*Miranda* statements. (Doc. No. 14).

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1 The parties have **ten (10) days** to serve and file written objections to the Report and
2 Recommendation. The parties are advised that any objections should be filed with the
3 following caption: **CR 08-874-TUC-CKJ.**

4 DATED this 10th day of October, 2008.

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7 Jennifer C. Guerin
8 United States Magistrate Judge
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